Filed 11/30/16 P. v. McDowell CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JONATHAN DEWITT MCDOWELL,<br>Defendant and Appellant. | E064587<br>(Super.Ct.No. SWF1500382)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and Kristen A. Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

On February 18, 2015, an information charged defendant and appellant Jonathan Dewitt McDowell with making criminal threats under Penal Code section 422 (count 1). The information also alleged that defendant suffered two prior prison terms under Penal Code section 667.5, subdivision (b); one prior serious felony conviction under Penal Code section 667, subdivision (a)(1); and one prior strike conviction under Penal Code sections 667, subdivisions (c) and (e)(1) and 1170.12, subdivision (c)(1).

On June 9, 2015, a jury found defendant guilty of making criminal threats; and on June 10, 2015, the jury found the allegations true. On August 14, 2015, the trial court sentenced defendant to prison for 12 years, calculated as the upper term of three years for count 1, doubled to six years for the strike prior, plus a consecutive five years for the serious felony prior, and a consecutive one year for one of the prison priors.

On September 28, 2015, defendant filed a notice of appeal.

## FACTUAL AND PROCEDURAL HISTORY

John Doe worked as a correctional officer in the "B-Pod" housing unit of the Riverside County Southwest Detention Center. The inmates in that unit were primarily from the prison's administrative segregation unit and were classified as "Level 6"—the highest level for inmates based on their overall behavior. Inmates in administrative segregation were housed in individual cells because they tended to be violent and did not get along with other inmates. Defendant, a Sex Cash Money criminal street gang member, was housed in this unit.

On January 9, 2015, Doe was passing out mail to the inmates in the "B-Pod" when defendant handed him a complaint regarding his mail; defendant believed that a money order was taken from his mail. Defendant became agitated, raised his voice, and cussed at Doe. Doe tried to diffuse the situation by explaining that he would submit defendant's complaint. Defendant responded, "Stop being a bitch and be a man about it." Doe informed defendant that he could not do anything about defendant's complaint at that time and began to walk away. Defendant then stated, "F—k you. I'll fuck your wife and I'll kill [your] fucking kids."

Doe felt upset, angry and afraid. He felt that defendant could imminently carry out his threats on Doe's wife and children. Doe informed his fellow deputies about the incident, and one deputy took a report and forwarded it for criminal prosecution.

As a result of the incident. Doe's home address was flagged for protection. Doe required his children to sleep in his bedroom because he was afraid defendant's threat might be carried out. Moreover, Doe inquired about having his wife carry a concealed weapon.

Doe believed that defendant could carry out his threat because, although defendant was in custody and could not personally act on his threat, he had the ability to use a telephone call or meet with a prison visitor and instruct someone else to carry out the threat for him. Doe knew that defendant was a self-admitted member of the Sex Cash Money gang, which had a reputation for violence. Doe also interpreted defendant's gang membership as an indication that he was dangerous. Additionally, Doe knew that defendant was a high-ranking member of the gang and was considered a "shot-caller."

From reviewing defendant's behavioral record, Doe knew that defendant had a propensity for violence because he assaulted several other inmates, had fought with jail staff, and had made threats to other deputies.

## DISCUSSION

### A. DEFENDANT'S CONVICTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Defendant contends there was insufficient evidence to support his conviction for making criminal threats (Pen. Code, § 422; count 1).[1] We disagree.

"When reviewing a claim of insufficiency of evidence, we must view the evidence in the light most favorable to the verdict and presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from that evidence. The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. We must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proof beyond a reasonable doubt of each essential element of the offense. Substantial evidence must be of ponderable legal significance, reasonable in nature, credible and of solid value." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584-585.)

[1] All further statutory references are to the Penal Code unless otherwise indicated.

In making our determination, we do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of the witnesses. (*People v. Little* (2004) 115 Cal.App.4th 766, 771.) Resolution of conflicting evidence and credibility issues is for the jury to decide. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.)

The crime of criminal threat, as set forth in section 422, contains five elements: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat-which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

The determination of whether the defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal to convey to the victim an immediacy of purpose, can be based on all the surrounding circumstances and not just on the words alone. In other words, the parties' history can be considered as one of the relevant circumstances. (*People v. Mosley* (2007) 155 Cal.App.4th 313, 324 (*Mosley*).)

Further, with respect to the fourth element, "sustained" means a period of time that extends beyond what is momentary, fleeting or transitory. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

In this case, defendant challenges the sufficiency of evidence as to the third element. He argues that the evidence failed to establish an immediate threat because Doe acknowledged that defendant could not personally carry out his threat.

In order to satisfy the third element, the test is whether in light of the surrounding circumstances, e.g., the prior relationship of the parties and the manner in which the statement was made, the communication was sufficiently unequivocal, unconditional, immediate and specific as to convey to the victim a gravity of purpose and immediate prospect of execution. (*People v. Bolin* (1998) 18 Cal.4th 297, 340; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 860-861.) Section 422 does not require an immediate ability to carry out the threat. (*People v. Smith* (2009) 178 Cal.App.4th 475, 480.) "'A threat is sufficiently specific where it threatens death or great bodily injury. A threat is not insufficient simply because it does "not communicate a time or precise manner of execution, section 422 does not require those details to be expressed."'" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 806, 815 (*Wilson*) [finding sufficient evidence supported conviction where prisoner threatened to kill officer when released from custody in 10 months].)

In *Mosley, supra,* 155 Cal.App.4th 313, the defendant, an inmate, told one correctional officer that he planned to obtain the officer's contact information from the Department of Motor Vehicles using a telephone in a courthouse lockup facility, then pass that information to his gang affiliates so they could kill the officer and rape his wife. (*Id.* at pp. 316-318.) The defendant bragged about the murder of an officer in a nearby correctional facility, claiming that his gang associates were responsible. (*Id.* at pp. 317-318, 320-321.) Officers also repeatedly found the defendant in possession of weapons in his cell. (*Id*. at pp. 315-321.) The defendant argued that the immediacy element was not present because he was an inmate in a segregated module, which constricted his movement. (*Id.* at p. 324.) The court rejected this argument and found that there was substantial evidence in light of the defendant's ability to obtain weapons as well as his gang connections. (*Ibid.*)

In *People v. Gaut* (2002) 95 Cal.App.4th 1425, a defendant in the county jail routinely called his former girlfriend and left messages threatening to kill her. (*Id.* at pp. 1428-1429.) The girlfriend feared that the defendant would send someone to her home to harm her because the defendant said, "'Somebody gone [*sic*] come see you.'" (*Id.* at pp. 1428, 1432.) The defendant contended that the evidence was insufficient because he was incarcerated at the time of the threat and therefore, unable to carry it out. (*Id.* at p. 1431.) The court disagreed and held that the surrounding circumstances, including the defendant's violent history with his former girlfriend, supported the judgment. (*Id.* at pp. 1431-1432.)

In *Wilson, supra,* 186 Cal.App.4th 789, the defendant, a prisoner at a correctional institution, threatened several correctional officers that he would "'blast'" them upon his parole-scheduled release from prison in 10 months. (*Id.* at p. 795.) The Defendant claimed to have a history of finding and killing officers. (*Id.* at pp. 815-816.) Unlike the facts in *Mosley, supra,* 155 Cal.App.4th 313, the defendant in *Wilson* did not have outside contacts, access to weapons, nor the ability to carry out the threat at that exact moment. Nevertheless, the appellate court found that the criminal threat conviction was supported by substantial evidence considering all of the surrounding circumstances. The court held that the defendant "effectively made an appointment to kill [the officer] at his earliest possible opportunity." (*Wilson, supra,* 186 Cal.App.4th at p. 814.)

In this case, the jury could have found that defendant's gang connections demonstrated an "immediate prospect" that the threat would be carried out. The jury learned that defendant was housed in administrative segregation and was a self-admitted member of a gang that was known for being particularly violent. From reviewing defendant's prison behavior record, Doe discovered that defendant was a high-ranking member of the gang and was considered a "shot-caller." Doe also knew that defendant had a history of being assaultive towards staff and other inmates, and had threatened various correctional deputies in the past. Additionally, Doe knew that defendant had the ability to make phone calls, send and receive mail, and meet with visitors from outside of prison. Therefore, the element of immediacy was supported by substantial evidence, even though defendant was incarcerated.

Defendant, however, emphasizes that he could not independently carry out the threat. Defendant ignores the significance of his gang connections and violent history. As explained in *People v. Mendoza* (1997) 59 Cal.App.4th 1333, "the determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific [as to convey] to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances." (*Id.* at p. 1340 [considering gang membership and the defendant and victim's prior relationship to evaluate the sufficiency of the evidence].)

Here, based on Doe's knowledge of defendant's high-ranking gang status and violent history, it is more than reasonable that defendant's threat "conveyed to [Doe] an immediacy of purpose and immediate prospect of execution of the threat . . . based on all the surrounding circumstances." (*Mendoza*, *supra*, 59 Cal.App.4th at p. 1340.) Doe's actions after defendant's threat showed that Doe perceived an immediacy of threat in that he had his home address flagged for protection, had his children sleep in his bedroom, and inquired about his wife being able to carry a concealed firearm. Moreover, although section 422 requires an immediate prospect of execution, it "does not require an immediate ability to carry out the threat." (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679.)

Defendant attempts to distinguish his case from *Wilson, supra*, 186 Cal.App.4th 789. Contrasting *Wilson*, defendant argues that Doe knew that defendant could not carry out the threat himself and claims that "[t]here is no immediacy to the threat." Defendant ignores his membership in the gang and his high-ranking status in the gang. Defendant also tries to contrast his case from *Mosley, supra*, 155 Cal.App.4th 313. Defendant claims that, unlike the defendant in *Mosley*, there was no evidence that Doe could have perceived an immediate prospect that defendant could carry out his threat. However, it is unnecessary for the facts to be as egregious as those in *Mosley* to constitute a violation of section 422. Here, defendant threatened great harm to Doe's family. As repeated previously, this threat could have been carried out in the near future as there was substantial evidence to support defendant's gang membership in a notoriously violent gang. Defendant had the ability to communicate with his fellow gang members. These facts, in combination with his status as a high-ranking "shot-caller," was more than substantial to justify the jury's immediacy finding. (*Mosley, supra*, 155 Cal.App.4th at pp. 325-326.)

Because the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1426.)

B. THE TRIAL COURT HAD NO DUTY TO INSTRUCT THE JURY ON ATTEMPTED CRIMINAL THREAT AS A LESSER INCLUDED OFFENSE TO COUNT 1

Defendant next contends the trial court had a duty to instruct sua sponte on the lesser included offense of attempted criminal threat. A trial court has an independent duty to instruct the jury on lesser included offenses when there is substantial evidence about whether all the elements of a charged offense are present and that defendant committed the lesser included offense, which would exculpate the defendant from guilt of the greater offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218; *People v. Cunningham* (2001) 25 Cal.4th 926, 1008; *People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*); *People v. Webster* (1991) 54 Cal.3d 411, 443.) In deciding whether there is substantial evidence of a lesser offense, "courts should not evaluate the credibility of witnesses, a task for the jury." (*Breverman*, at p. 162.)

The appellate court independently reviews a trial court's failure to instruct on a lesser included offense. (*Breverman*, *supra*, 19 Cal.4th at p. 162.) We hold there was no substantial evidence for the jury to conclude that defendant was guilty of the lesser offense of attempted criminal threat, but not guilty of the charged offense of making a criminal threat. (*Id.* at p. 177.)

Attempted criminal threat (§§ 664, 422) is a lesser included offense of making a criminal threat: "[A] defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or

she is putting a plan into action." (*People v. Toledo, supra*, 26 Cal.4th at p. 230; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607, 609.) For example, if a threat does not actually cause the threatened person to be in sustained fear for his or her safety, although that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. (*Toledo*, at p. 231.)

In *In re Ricky T.* (2001) 87 Cal.App.4th 1132, an appellate court found a lack of substantial evidence to support the element of sustained fear where a high school student left class to use the restroom and, upon returning, "found the classroom door locked and pounded on it." (*Id.* at p. 1135.) When the teacher opened the door, the door struck the student, who became angry, cursed at the teacher, and said, "'I'm going to get you.'" The teacher "felt threatened" and sent the student to the office. The police were not notified until the next day. The appellate court found there was simply no evidence that the teacher "felt fear beyond the time of the angry utterances" and the student's response was "an emotional response to an accident rather than a death threat that induced sustained fear." (*Id.* at pp. 1140-1141.) Thus, nothing indicated any fear was more than fleeting or transitory. (*Id.* at p. 1141.)

The circumstances in this case more closely resembles *People v. Fierro* (2010) 180 Cal.App.4th 1342, involving an altercation at a gas station during which the defendant lifted his shirt to display a weapon and threatened to kill the victim. The victim drove away shortly after the threat, but called 911 within 15 minutes and ultimately testified he was in fear for his life. (*Id.* at p. 1346.) Even though the threat occurred during a minute and the victim departed immediately, the court held that

defendant's "actions created a sustained fear, a state of mind that was certainly more than momentary, fleeting, or transitory." (*Id.* at p. 1349.)

In this case, as stated in detail *ante*, defendant's threat made Doe afraid for his life and the lives of his wife and children. Moreover, Doe testified that he was still afraid at the time of trial—five months after the incident. After defendant's threat, Doe required his family to sleep together in one bedroom. He attempted to obtain a concealed firearm permit for his wife. Moreover, his address was flagged for special protection. Furthermore, Doe was aware of defendant's violent history and knew that defendant had assaulted both inmates and other correctional deputies in the past. Doe testified that he believed defendant could carry out his threat because of his violent history, violent behavior and his high-ranking status in his gang. The evidence established that defendant's threat conveyed a gravity of purpose and an immediate prospect of execution of the threat to Doe, and that defendant's actions caused created a sustained fear. There was no evidence presented to counter that Doe did not experience sustained fear. Therefore, defendant is asking this court improperly to reevaluate Doe's credibility as a witness. (*Breverman*, *supra*, 19 Cal.4th at p. 162.)

Nonetheless, defendant argues that there "are questions as to the sufficiency of the evidence as to the element[s] of 'an immediate prospect of execution'" and "sustained fear" because Doe acknowledged that defendant could not carry out the threat himself. The evidence, which was discussed in detail *ante*, showed the defendant's conduct and threat, his assaultive history, and the steps Doe took to protect himself and his family as a result of the threat, provided sufficient evidence that Doe was in actual sustained fear of

defendant and was convinced that he would carry out his threats via his connections through his gang membership. Therefore, the trial court had no sua sponte duty to instruct the jury on attempted criminal threats.

Even if there was error, the failure to instruct on lesser included offenses is not a structural defect in the proceedings; thus, reversal is not warranted unless an examination of the entire case, including the evidence, discloses that the error produced a miscarriage of justice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, there was no prejudice because there was ample evidence of defendant's guilt of the greater offense, as discussed in detail *ante*. In light of the more than substantial evidence to support defendant's conviction for the greater offense of making criminal threats, it is not reasonably probable that defendant would have obtained a more favorable outcome if the jury had been instructed of attempted criminal threat. (*Breverman, supra*, 19 Cal.4th at pp. 176-178.) Any error was harmless.

C. THE TRIAL COURT PROPERLY ADMITTED GANG EVIDENCE

Defendant claims that the trial court erred in allowing the prosecution to elicit testimony from Doe regarding defendant's gang affiliation for the purpose of showing the immediacy of the threat and the reasonableness of Doe's fear. Defendant contends that the evidence was irrelevant, inadmissible and prejudicial. We disagree.

1. *ADDITIONAL FACTS*

Prior to trial, the prosecution moved to admit evidence of Doe's knowledge of defendant's gang affiliation and history of violence while in custody in order to

demonstrate why Doe was in sustained fear for purposes of proving a violation of section 422.

During motions in limine, defense counsel argued that under Evidence Code section 352, the prejudicial effect of such evidence outweighed its probative value because there was no connection between the evidence of defendant's gang affiliation and the statement made by defendant. Defense counsel argued that the jury would use the proposed gang evidence to assume that defendant had a disposition to commit criminal acts.

The trial court ruled that the proposed gang evidence was admissible. The court noted that evidence of defendant's criminal history was relevant to establish the fifth element of a section 422 violation—that the threat actually caused Doe to be in sustained fear for his own safety or for the safety of his own immediate family.

2. *ANALYSIS*

"California courts have long recognized the potentially prejudicial effect of gang membership. As one California Court of Appeal observed: '[I]t is fair to say that when the word "gang" is used in Los Angeles County, one does not have visions of the characters from [the] "Our Little Gang" series. The word gang . . . connotes opprobrious implications. . . . [T]he word "gang" takes on a sinister meaning when it is associated with activities.' [Citation.] Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only *tangentially* relevant to the charged offenses. [Citation.] In fact, in cases not involving gang enhancements, the Supreme Court has held evidence of gang membership should not be

admitted if its probative value is minimal. [Citation.] 'Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.'

"Thus, as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. [Citations.] 'Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]' [Citation.] Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury.

"[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that

resulted in a manifest miscarriage of justice. [Citations.]" [Citation.]' [Citations.] It is appellant's burden on appeal to establish an abuse of discretion and prejudice." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-225.)

Here, defendant contends that the gang evidence "was irrelevant and not admissible under any exception." As discussed *ante*, evidence of defendant's gang affiliation was relevant. To convict defendant of making a criminal threat, the People had to prove that defendant's threat caused Doe to be in reasonable sustained fear for his and his immediate family's safety, and that the "threat was so clear, immediate, unconditional, and specific that it communicated to [Doe] a serious intention and the immediate prospect that the threat would be carried out." (CALCRIM No. 1300; see *People v. Roldan* (2005) 35 Cal.4th 646, 706.)

In this case, testimony relating to defendant's gang affiliation was probative of the immediacy of the threat of whether Doe was in reasonable sustained fear of the threat made by defendant. Doe testified that he believed defendant, a self-admitted Sex Cash Money gang member, could imminently carry out his threat because of his violent background, his high rank in the gang, and his ability to communicate with people outside of prison. This testimony was relevant to counter defense counsel's attempts in cross-examination to elicit testimony from Doe that defendant could not possibly carry out his threat because he was in custody. As explained by the prosecutor, gang evidence was offered simply as an indication of Doe's state of mind—i.e., even though defendant was in custody, Doe felt that defendant was capable of harming him and his family.

Therefore, the details of defendant's gang affiliation and his ability to give orders to fellow gang members were relevant to the elements of sustained fear and immediacy.

Regarding Evidence Code section 352, although gang evidence may be prejudicial, here the probative value far outweighed any prejudicial effect. """Unless the dangers of undue prejudice, confusion, or time consumption '"substantially outweigh"' the probative value of relevant evidence, a[n Evidence Code] section 352 objection should fail. [Citation.] '"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' [Citation.] [¶] The prejudice that [Evidence Code] section 352 '"is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' [Citation.] In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose."""" (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

At the hearing on the motion, the trial court carefully listened to the arguments made by counsel and analyzed the potential prejudicial effect of admitting the gang evidence. The court stated, "I think more significant is the fact that the fifth element that the jury will be instructed on is that the threat actually caused—and we have 'insert the name of the complaining witness'—to be in sustained fear for his or her own safety or for the safety of his or her own immediate family. So, again, the district attorney has to prove by proof beyond a reasonable doubt that the deputy was in sustained fear."

The court went on to state, "But it sure seems to me that if the threat comes from an inmate who has had no criminal history, who is 55 years old, is in custody on an embezzlement charge, that would be treated far differently than someone who was in custody for, say, the murder of a police officer, who has gang allegations, who has assaulted officers in prior occasions. I think that he'd be stupid not to, in his own mind, judge the threats separately, basically, based upon who he is talking to and what their backgrounds are. I think the case law is clear on that point."

The court went on to cite several cases that allowed the prosecution to admit gang evidence and how those cases related to this case. Thereafter, the court stated, "So I think that the fact that the defendant is a significant member of a particular gang, the fact that the defendant is engaged in other conduct—assaultive conduct against correctional officers, would be things I would think that anyone would take more seriously as opposed to someone who didn't know those things. [¶] So the ruling is that you'll be allowed to introduce some evidence in the classification notes, nothing after the date in question."

In sum, the trial court carefully scrutinized the proffered evidence and correctly found its prejudicial effect did not outweigh its probative value in establishing motive, intent, plan, and knowledge. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [evidence of gang membership is admissible to prove specific intent, means of applying force, or other issues pertinent to guilt of the charged crime].)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.